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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. BENNETT TAYLOR GORS, Defendant and Appellant.	E068829 (Super.Ct.No. BAF1600641) OPINION

APPEAL from the Superior Court of Riverside County. John M. Monterosso, Judge. Affirmed.

Alissa Bjerkhoel, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, and Charles C. Ragland and James H. Flaherty III, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Bennett Taylor Gors took advantage of his friendship with the family of a six-year-old girl to molest her repeatedly over a period of about a month. He convinced

her that she was his "girlfriend," and he got her to cooperate with his sexual demands. He used his cell phone to make videos of their highly sexualized interactions.

At trial, in light of the appalling yet incontrovertible video evidence, defense counsel conceded that defendant was guilty of lewd touchings; he argued, however, that there was a reasonable doubt as to whether defendant engaged in intercourse, sodomy, or oral copulation, which were not shown in the videos, but which the victim had recounted to investigators. Nevertheless, a jury found defendant guilty on all counts.

In this appeal, defendant contends:

1. The trial court erred by denying defendant's motion for a mistrial, which was based on the victim's grandmother's volunteered testimony recounting the victim's statement that she called 911 after defendant "attack[ed]" her.

2. Defense counsel rendered ineffective assistance by referring in opening statement to evidence that the victim had been exposed to pornography but never actually introducing such evidence.

We find no error. Accordingly, we will affirm.

I

FACTUAL BACKGROUND

Defendant was a friend of the family of victim Jane Doe.[1]

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[1] The trial court ordered that the victim be referred to in the record by this fictitious name. (Pen. Code, § 293.5.)

In May 2016, when Doe was six, her uncle discovered videos of her on defendant's cell phone. These[2] included Doe spreading her legs and exposing her vagina; Doe dropping her pants and once again exposing her vagina; Doe biting defendant's fly and "grabbing his private parts over his pants"; and Doe reaching up into defendant's shorts and "apparently grabbing his private parts . . . ."

Defendant could be heard urging Doe to "[s]how me your pussy" and to "sit on my dick" "with your little pussy lips." However, when Doe said, "Next time put it in my butt," he replied, "No[,] not putting it inside is what I said. You're too small[,] I'm not gonna do that." He called Doe his "girlfriend."

Doe's family took the cell phone to the police.

In a forensic interview, Doe said (using appropriately childish terms) that defendant touched her vulva under her underwear. He also had her touch his penis under his underwear and move her hands up and down. At times, "gr[a]y water" came out of a "hole" in defendant's penis.

Doe also said that defendant put his penis in her vulva twice and in her anus once, and each time, it hurt. She described how he put her legs up. She also said he put his penis in her mouth two times. When he did so, his penis "move[d] around." He put his mouth and tongue on her vulva more than once.

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[2] Mercifully, the videos have not been transmitted to us; we are working off of a witness's descriptions of them.

Defendant told Doe they were "boyfriend and girlfriend forever." He also said, if she told on him, he would "[b]reak up" with her and he would go to jail.

A physical examination of Doe revealed two anal fissures and anal dilation. These could have been caused by sodomy, but they could also have been caused by constipation or some other medical condition.

At trial, Doe testified that defendant touched her vulva, she touched his penis, his penis touched her vulva, her mouth touched his penis, and his mouth touched her vulva. Sometimes he used his cell phone to video-record these activities.

A male cousin had once masturbated in front of Doe; "gray water" came out of his penis, too.

There was expert testimony about child sexual abuse accommodation syndrome.

II

PROCEDURAL BACKGROUND

After a jury trial, defendant was found guilty on two counts of sexual intercourse or sodomy with a child under 11 (Pen. Code, § 288.7, subd. (a)); two counts of oral copulation with a child under 11 (Pen. Code, § 288.7, subd. (b)); two counts of lewd acts on a child under 14 (Pen. Code, § 288, subd. (a)); and one count of possession of child pornography (Pen. Code, § 311.11, subd. (a)). He was sentenced to a total of 90 years 8 months to life in prison, along with the usual fines, fees, and miscellaneous orders.

III

MOTION FOR MISTRIAL BASED ON TESTIMONY VOLUNTEERED BY A WITNESS

Defendant contends that the trial court erred by denying his motion for a mistrial, which was based on a witness blurting out the victim's hearsay statement that she called 911 after defendant "attack[ed]" her.

A. *Additional Factual and Procedural Background.*

The victim's grandmother testified that, about a month before the molestation came to light, the victim hid in a closet, called police and "told them somebody's murdering her mother." This exchange followed:

"Q. At any point . . . after [the molestation came to light], did you receive any more information about what occurred that day?

"A. Yes, I had.

"[DEFENSE COUNSEL]: Objection. [¶] . . . [¶] . . .

"THE COURT: Well, she answered. She said yes. [¶] Next question, [prosecutor]?

"[PROSECUTOR]: And as a preemptive issue, I'd ask to follow up with the next question as a fresh complaint.

"THE COURT: Just ask your question, then we'll deal with it. I'm not sure what you're asking.

"Q. BY [THE PROSECUTOR]: How did you obtain more information about what happened the first day the police came?

"[DEFENSE COUNSEL]: Objection. Calls for hearsay. [¶] . . . [¶] . . .

"THE COURT: No. Just — you can answer the method you received the information. Please don't tell us what information you got, just tell us the method.

"THE WITNESS: I asked my granddaughter if she was being attacked on that day when she called, and she told me, yes, that [defendant] was attacking her.

"[DEFENSE COUNSEL]: I'm going to move to strike the answer as hearsay at this point.

"[PROSECUTOR]: And the People would ask to either qualify as a spontaneous statement or fresh complaint."

After sending the jury out to lunch, the trial court discussed the issue with counsel. Eventually, it ruled that the victim's statement was inadmissible and struck it.

Defense counsel then moved for a mistrial. The trial court denied the motion. It explained: "I don't believe that what has been presented is prejudicial in the least, especially in light of . . . where I see this trial being battled. The issue that both sides seem to be battling over has to do with the extent of the physical contact the defendant's alleged to have with Jane Doe. You so conceded in your opening statement. So the evidence that was produced that I'm striking is really not relevant to that issue. It's really tangential. . . . I also think [a] curative instruction will solve any prejudice that may be lingering in the eyes of the jury."

The trial court instructed the jurors: "[T]here was some testimony related to purportedly a 9-1-1 call made and reasons why the 9-1-1 call was made. That evidence has been stricken from the record with regards to the reasons for the 9-1-1 call being made and what would have been purportedly said on the 9-1-1 call. That evidence is irrelevant and it's been stricken. You're not to consider it for any purposes at all."

B. *Discussion*.

"[A] court should grant a mistrial if it 'is apprised of prejudice that it judges incurable by admonition or instruction.' [Citation.] Whether an incident is prejudicial and requires a mistrial is 'by its nature a speculative matter,' and the "'trial court is vested with considerable discretion in ruling on mistrial motions."' [Citation.] Thus, courts should grant a mistrial when defendant's """'chances of receiving a fair trial have been irreparably damaged.'"""" [Citation.]" (*People v. Williams* (2016) 1 Cal.5th 1166, 1185.) "We review a trial's ruling denying a motion for mistrial under the deferential abuse of discretion standard. [Citation.]" (*People v. Elliott* (2012) 53 Cal.4th 535, 583.) "[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

"'Although most cases involve prosecutorial or juror misconduct as the basis for the motion, a witness's volunteered statement can also provide the basis for a finding of incurable prejudice.' [Citation.]" (*People v. Dement* (2011) 53 Cal.4th 1, 40, disapproved on other grounds in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

However, "it is only in the 'exceptional case' that any prejudice from an improperly volunteered statement cannot be cured by appropriate admonition to the jury. [Citations.]" (*People v. Franklin* (2016) 248 Cal.App.4th 938, 955.)

Preliminarily, the People argue that "she" and "her" in the grandmother's testimony may have referred to the victim's mother — i.e., that the victim may merely have confirmed that her mother had been attacked. This argument is frivolous. The trial court and counsel discussed the issue over many pages of the reporter's transcript, and nobody ever suggested that the testimony referred to anyone other than the victim. Indeed, the prosecutor argued that the fresh complaint doctrine applied, which would require that the victim be disclosing an attack on herself. (See *People v. Arredondo* (2017) 13 Cal.App.5th 950, 955, fn. 2.)

Turning to the merits, the trial court's conclusion that the jury could follow its instruction to disregard the evidence was not arbitrary or irrational. That evidence was to the effect that, on the same day as Doe called 911, defendant "was attacking" her. The grandmother was the first to use the word "attack"; the victim simply agreed with her. Thus, it is not at all clear what conduct the victim was referring to.

This evidence was considerably less inflammatory than the other evidence in the case. The jury watched the videos, which by all accounts were shocking. Moreover, defense counsel conceded in both opening statement and closing argument that defendant was guilty of lewd acts; he simply asked the jury to acquit on the counts based on intercourse, sodomy, and oral copulation. Defendant argues that the fact that Doe called

911 indicated that the "attack" was some form of penetrative sex. This is speculation. It is just as likely that the victim — who, after all, was only six years old — was referring to a lewd act as to intercourse or sodomy.

Finally, this evidence was just one more statement by the victim. She made far more specific statements accusing defendant of intercourse, sodomy, and oral copulation in the forensic interview as well as at trial. Thus, her hearsay statement "was largely duplicative of evidence the jury properly received." (*People v. Dement, supra*, 53 Cal.4th at p. 40 [133 Cal.Rptr.3d at p. 533.)

Defendant did want the jury to hear that Doe called 911 and falsely reported an attempt to murder her mother. Defense counsel even discussed this evidence in his opening statement. As defendant says, it showed that Doe "was capable of lying about serious matters . . . ." Defendant argues that the victim's hearsay explanation made her lie more understandable and thus lessened its impeachment value. This argument is moot, however, because the trial court instructed the jury to disregard both the contents of the 911 call (i.e., the false statement that the victim's mother was being murdered) and the circumstances of the 911 call (i.e., the statement that defendant had attacked the victim). Defense counsel forfeited any argument that the contents should have remained in evidence, and only the circumstances should have been excluded, by failing to raise it below. In fact, he affirmatively requested an instruction "that nothing [the grandmother] said immediately prior to the lunch hour, that portion we're talking about, be considered."

In sum, then, defendant has not shown that the trial court abused its discretion by denying a mistrial.

IV

DEFENSE COUNSEL'S CLAIM IN OPENING STATEMENT THAT DOE HAD SEEN PORNOGRAPHY

Defendant contends that his trial counsel rendered ineffective assistance by promising, in opening statement, to prove a fact that he ultimately did not prove.

A. *Additional Factual and Procedural Background.*

In his opening statement, defense counsel said: "[O]ne question I expect that will come up is how will a six-year-old girl know about sexual matters? . . . The evidence will absolutely show that she had prior knowledge of sexual matters. And you'll know that — I don't believe this will be in dispute — that she had come from a family where she had seen pornographic materials, where . . . her older cousin had masturbated in front of her. So that evidence, I expect, will give you some reason to believe that she had prior knowledge about sex that a normal six-year-old probably wouldn't be expected to have."

Ultimately, evidence was introduced that the victim's older male cousin had masturbated in front of her. However, there was no evidence that she had seen pornography.

B. *Discussion.*

"'In order to establish a claim for ineffective assistance of counsel, a defendant must show that his or her counsel's performance was deficient and that the defendant

suffered prejudice as a result of such deficient performance. [Citation.] To demonstrate deficient performance, defendant bears the burden of showing that counsel's performance """"fell below an objective standard of reasonableness . . . under prevailing professional norms.""""" [Citation.] To demonstrate prejudice, defendant bears the burden of showing a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. [Citations.]" (*People v. Mickel* (2016) 2 Cal.5th 181, 198.)

"On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding. [Citations.]" (*People v. Mai* (2013) 57 Cal.4th 986, 1009.)

"Ineffective assistance of counsel is not demonstrated simply because the evidence at trial does not mirror counsel's opening statement. 'Forgoing the presentation of testimony or evidence promised in an opening statement can be a reasonable tactical decision, depending on the circumstances of the case.' [Citation.]" (*People v. Carrasco* (2014) 59 Cal.4th 924, 987.)

The People argue that "counsel clarified that the 'pornographic material' he referenced was the masturbating cousin. Thus, counsel did fulfill his promise . . . ." If defense counsel's comments were intended as a clarification, they do not come across as

such. One would hardly refer to a face-to-face confrontation with a person who is masturbating as "pornographic materials." We understand — and we believe a reasonable juror would have understood — that defense counsel was promising *both* evidence of pornography *and* evidence of a masturbating cousin.

Defense counsel, however, has never been asked to explain the asserted ineffective assistance. Moreover, this is not a case in which there could be no satisfactory explanation. For example, defense counsel could have had a witness lined up who could testify that the victim had seen pornography, but who became unavailable (or uncooperative) sometime after opening statement.

Separately and alternatively, defendant has not shown that the asserted ineffective assistance of counsel was prejudicial. The reference to pornography was brief and was made some six days before the case went to the jury. Moreover, it was coupled with a reference to the victim's cousin masturbating in front of her. The evidence regarding the victim's cousin did come in, and it did tend to explain her knowledge regarding "gray water." Defense counsel argued precisely this in closing. The prosecutor did not take advantage of the unfulfilled promise in his closing argument. It seems unlikely that, by then, the jurors would have been influenced by defense counsel's unfulfilled promise to introduce evidence of pornography.

Defendant argues, "Had defense counsel followed through with his promise to the jury to present evidence that Jane Doe was exposed to pornographic material to explain her knowledge of intercourse, and not just her knowledge of semen, it is reasonably

probable that at least one juror would have had doubts about the intercourse counts." The relevant ineffective assistance, however, is not the failure to present evidence of pornography. As far as the record shows, no such evidence was available.[3] Rather, the only even arguable ineffective assistance is the promise to present the evidence. And it is unlikely that this promise, even though unfulfilled, affected the jury's deliberations. Even in its absence, the jury would have reasoned that Doe's precocious knowledge was evidence that defendant did exactly what she said he did.

V

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

MILLER
J.

RAPHAEL
J.

[3] Defendant told the probation officer that "[t]he victim would . . . watch pornography that belonged to her mother's boyfriend." This falls short of showing, however, that defendant had personal knowledge of this, much less that there was any other admissible evidence of it.